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No. 07-48

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

MARSHA SEIBER and ALVIN SEIBER,
Petitioners,

v.

STATE OF OREGON, by and through the
Oregon State Board of Forestry,
Respondent.

On Petition for a Writ of Certiorari to the Oregon Court of Appeals

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

This Court should grant the petition for writ of certiorari because it presents two important questions of federal law, decided incorrectly by the Oregon Court of Appeals and denied review by the Oregon Supreme Court. The state court decided both of those issues in a way that conflicts with the applicable decisions of this Court. First, the state court decided that petitioners could pursue their regulatory takings claim under *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), only on a "whole parcel" theory. That holding contradicts this Court's rulings. Second, by subscribing erroneously to the "whole parcel" theory, the state court was able to ignore a jury's findings that entitled petitioners to

relief. This Court should grant the petition to develop its prior decisions and to confirm that the state court acted contrary to those decisions.

Petitioners reply here to address two new arguments raised in the respondent's opposition brief. First, respondent errs when it contends that the Oregon Court of Appeals "followed this Court's settled precedent" regarding regulatory takings. Post-*Penn Central* cases that respondent discusses appear to *confirm* a plaintiff's ability, in a case like this one, to pursue a regulatory taking claim free from any rule that the taking must embrace the total value of the "whole parcel." Second, respondent is wrong to assert that state property law prevents petitioners from asserting a federal regulatory takings claim.

A. This Court's Regulatory Takings Cases Indicate that a Plaintiff May Assert a Partial Takings Claim Under *Penn Central*.

Petitioners submit that this Court's precedents regarding regulatory takings allow for partial taking claims. Respondent's assertion to the contrary that those precedents are "settled" and require the "whole parcel" rule shows only that, to the extent that there is any ambiguity, this court should accept review to resolve it.

In *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), this Court considered whether the state's denial of a landowner's application for partial filling of wetland acreage constituted a compensable taking. In the courts below, the landowner had brought only a claim for a total regulatory taking under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). 533

U.S. at 623-24. The landowner argued for the first time in this Court that he also had a *Penn Central* non-total regulatory taking claim because the regulation deprived him of all rights except the building of a residence on the property. *Id.* Although the Court ultimately declined to address the plaintiff's *Penn Central* claim for non-preservation, it noted that

> "[w]here a regulation places limitations on land that fall short of eliminating all economically beneficial use, a taking nonetheless may have occurred, depending on a complex of factors including the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action."

Id. at 617.

In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002), the Court again addressed a case in which the *Penn Central* issue was not fully raised but noted again the existence of the *Penn Central* remedy for non-total takings. This Court noted that "[t]he starting point for the [lower] court's analysis should have been to ask whether there was a total taking of the entire parcel; if not, then *Penn Central* was the proper framework." 535 U.S. at 331. In so noting, this Court recognized that there are cases in which a "total taking" does not occur, and that, in those cases, courts should evaluate the factors described in *Penn Central* to determine whether the circumstances of the particular case at hand constitute a compensable taking. The Court underscored that point, finding it "perfectly clear" that "Justice Black's oft-quoted com-

ment about the underlying purpose of the guarantee that private property shall not be taken for a public use without just compensation *applies to partial takings as well as total takings.*" *Id.* at 333 n.27 (emphasis added).

Palazzolo and *Tahoe-Sierra* make clear that this Court has contemplated a remedy, under *Penn Central*, for regulatory takings that do not take all economically beneficial use of the parcel. As described in petitioners' petition for writ of certiorari, the Oregon Court of Appeals acted contrary to those precedents in this case when it ignored the jury's finding regarding the economic impact of the state's timber regulation and decided for itself that the whole parcel rule barred petitioners' claim.

B. State Property Law Cannot Bar Petitioners' Federal Takings Claim.

Respondent suggests that state property law prevents petitioners' federal takings claim and that, therefore, this case is a poor candidate for review. Respondent is wrong, because changes in state property law cannot encroach upon the protections of the United States Constitution.

Under the Constitution, state courts may not redefine their states' property laws in order to avoid a regulatory taking of property for a public use. *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 167 (1998) ("[A] State may not sidestep the Takings Clause by disavowing traditional property interests long recognized under state law."); *see also Hughes v. State of Washington*, 389 U.S. 290, 296-97 (1967) (Stewart, J., concurring: "[A] State [court] cannot be permitted to defeat the constitutional prohibition against taking property without due

process of law by the simple device of asserting retroactively that the property [right] it has taken never existed at all."), *cited with approval in Lucas*, 505 U.S. at 1030. To do so would constitute an impermissible taking by judicial decree. Barton H. Thompson, Jr., "Judicial Takings," 76 Va. L. Rev. 1449 (1990); *see also Stevens v. City of Cannon Beach*, 510 U.S. 1207 (1994) (Scalia and O'Connor, JJ., dissenting from denial of certiorari, stating that "[n]o more by judicial decree than by legislative fiat may a State transform private property into public property without compensation"). As it has before, this Court should again accept review to correct the Oregon courts' construing the Fifth Amendment in order to avoid a regulatory taking. *See, e.g., Dolan v. City of Tigard*, 512 U.S. 374 (1994).

The state property law cited by respondent in this case would retroactively transform the nature of the property from what it was when petitioners initially filed this lawsuit. The Oregon Supreme Court's decision in *Coast Range Conifers v. Board of Forestry*, 339 Or. 136, 150-51, 117 P.3d 990, 997-998 (2005), made a major change in Oregon property law when it announced that "timber is part of the underlying real property unless it is subject to a contract to be cut." Prior Oregon precedent had stated that a growing crop, including timber, was property separate from the land. *Hawkins v. City of La Grande*, 315 Or. 57, 70-71, 843 P.2d 400, 407-408 (1992); *Paullus v. Yarbrough*, 219 Or. 611, 623, 347 P.2d 620, 626 (1959); *see also Franke v. Welch*, 254 Or. 149, 151-152, 458 P.2d 441, 443 (1969) ("there is nothing to preclude an owner of timberland from conveying or reserving all of his interest in the timber separate from the land," including even trees not yet germinated). Before *Coast Range Conifers*, the Oregon

Court of Appeals had followed those precedents in a case with facts almost identical to this one. *Boise Cascade v. Board of Forestry*, 131 Or. App. 538, 545-46, 886 P.2d 1033, 1037-38 (1994), *aff'd*, 325 Or. 185, 198, 935 P.2d 411, 420 (1997).[1]

Clearly, state courts may not tell this Court what the Fifth Amendment requires, especially when that dictate would transform the nature of the disputed property mid-litigation. Oregon property law does not create a barrier to review by this Court.

CONCLUSION

Petitioners respectfully urge the Court to grant their Petition for a Writ of Certiorari.

Respectfully submitted,

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[1] The litigation in *Boise Cascade* is ongoing; it is now before the Oregon Court of Appeals for the fourth time, after a jury verdict in favor of the landowner, because of the change of law stated in *Coast Range Conifers*.